

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE NATIONAL PRESCRIPTION OPIATE
LITIGATION

This document relates to:

Track One Cases

MDL No. 2804

Case No. 17-md-2804

Hon. Dan Aaron Polster

**SUMMARY SHEET FOR GENERIC MANUFACTURERS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs' Opposition confirms that summary judgment must be granted in Generic Manufacturers' favor.

First, Plaintiffs acknowledge that any claims against Generic Manufacturers based upon an alleged failure to disclose the risks of their generic medicines—or to correct statements by others—are preempted as a matter of law.¹

Second, while Plaintiffs insist that Generic Manufacturers are liable because they allegedly engaged in “misleading marketing,” Opp. at 1, the Opposition fails to identify any such evidence. As to many of the Generic Manufacturers, Plaintiffs cite literally *zero instances* of marketing at all. For the remainder, Plaintiffs fail to identify any marketing that said anything false or misleading with respect to generic opioid medications. This is not surprising: the Federal Trade Commission (“FTC”), Food and Drug Administration (“FDA”), numerous courts, and witnesses in this case—including Plaintiffs' experts—have all confirmed that, given their unique business model and drug substitution laws, generic manufacturers do not promote the safety or efficacy of their generic medicines, and have no economic incentive to do otherwise.²

Plaintiffs' Opposition fails to acknowledge this dispositive fact. Rather, Plaintiffs lump the Generic Manufacturers with entirely separate brand manufacturers and try to shift the focus to branded promotion. This motion, however, is limited to generic medicines, and *there is no evidence that any Generic Manufacturer ever marketed the safety or efficacy of its generic medications, in Ohio or elsewhere*. To the contrary, the evidence Plaintiffs cite confirms that any marketing activity by Generic Manufacturers as to their generic medicines—even in the few instances where there was any contact with prescribers—was limited to innocuous statements about those medicines' availability, price, and/or bioequivalence. Plaintiffs have not identified anything false about those statements. With no false statements, there is no false marketing; summary judgment should be granted.

Third, Plaintiffs make no effort to and cannot satisfy their burden of showing that marketing by the Generic Manufacturers *caused* any improper opioid prescriptions to be written in Summit or Cuyahoga County. Plaintiffs offer no company-specific evidence of causation. Instead, they have insisted throughout this litigation that they will prove causation through aggregate evidence. But they have not even attempted to offer such evidence as to Generic Manufacturers. Their primary causation expert, Dr. Rosenthal, has only attempted to calculate the impact of “detailing” (by all defendants, in the aggregate) on opioid shipments.³ And Dr. Rosenthal acknowledges that “manufacturers *will not detail* physicians for generics.”⁴ In short, Plaintiffs simply have no individual or aggregate evidence of causation as to the Generic Manufacturers. For this additional reason, summary judgment should be granted.

¹ See Pls.' Opp. to Generic Mfrs.' Mot. for Partial Summ. J. (“Opp.”), Dkt. No. 1860, at 3 (“Plaintiffs do not assert that the Generic Defendants should have made labeling changes.”); *id.* at 26 (“Plaintiffs do not assert Defendants should have changed the labels or otherwise make statements prohibited by federal law.”).

² See Generic Mfrs.' Mem. In Support of Mot. for Partial Summ. J. (“Mem.”), Dkt. No. 1749-2, at 2-9.

³ See Mem. in Support of Defs.' Mot. to Exclude Dr. Rosenthal (“Mot. to Exclude Dr. Rosenthal”), Dkt. No. 1913-1, at 1 (citing Rosenthal Report, Dkt. No. 1913-4, at ¶ 56 and Rosenthal Dep., Dkt. No. 1913-5, at 44:11–19.)

⁴ Rosenthal Dep., Dkt. No. 1913-5, at 197:23–198:4 (emphasis added).

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⁵ Mallinckrodt plc is an Irish company that is not subject to and contests personal jurisdiction for the reasons explained in its motion to dismiss for lack of personal jurisdiction. It is specially appearing to join this motion, and, thus, does not waive and expressly preserves its personal jurisdiction challenges.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 16, 2019, the foregoing was filed using the Court's CM/ECF filing system and will be served via the Court's CM/ECF filing system on all attorneys of record.

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